

January 7, 1999

D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-I

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies.

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• INTRODUCTION

This arbitration proceeding is held pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act"). The proceeding is a consolidated arbitration between New England Telephone and Telegraph Company, d/b/a/ Bell Atlantic-Massachusetts ("Bell Atlantic," formerly "NYNEX"), the incumbent local exchange carrier, and its competitors, AT&T Communications of New England; Brooks WorldCom, Inc., formerly Brooks Fiber Communications of Massachusetts, Inc.; MCI WorldCom, Inc. ("MCI WorldCom"), formerly MCI Telecommunications Corporation; Sprint Communications Company L.P.; and Teleport Communications Group, Inc. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.

On June 11, 1998, the Department of Telecommunications and Energy ("Department") issued an Order that set forth the costing method to be used by Bell Atlantic in pricing collocation services to competitive local exchange carriers ("CLECs"), as well as the terms and conditions of such services. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-G (1998) ("Phase 4-G Order"). Bell Atlantic filed a compliance filing in response to this Order on June 25, 1998 ("Compliance Filing"). On July 20, 1998, an informal conference was held to provide the CLECs with an opportunity to ask questions about the filing and to make suggested changes, during which the Arbitrator asked the parties to try to reach agreement on any disputed items. In October, it became evident that agreement on a number of points would not be achieved, and parties were asked to file written comments on any disputed portion of the compliance filing. MCI WorldCom filed such comments on November 5, 1998, and Bell Atlantic filed reply comments on November 13, 1998.

II. COST STUDY

No parties to this proceeding have indicated any problems with the cost study portion of Bell Atlantic's compliance filing. The Department has reviewed the cost study and finds that it is in compliance with the Phase 4-G Order. We therefore approve it. We now turn to the disputed aspects of the filing.

III. TERMS AND CONDITIONS

A. Appendix A, Paragraph 1

Appendix A of the compliance filing contains the terms and conditions that will apply if a CLEC chooses to pay its non-recurring collocation charges in installments rather than as

a one-time payment. Paragraph 1 of this Appendix states: "[s]ubject to the terms and conditions specified below, [CLEC] may, at its option, elect to amortize the nonrecurring charges for physical collocation over three years." MCI WorldCom suggests that this paragraph be left unnumbered and that the subsequent paragraphs (Appendix A, Paragraphs 2-7) be renumbered and made subparts to the unnumbered first paragraph. MCI WorldCom states that this change will facilitate the integration of these new terms into interconnection agreements and clarify that the subsequent paragraphs only come into play when the CLEC has opted to use the installment payment alternative. MCI WorldCom also suggests that the clause, "in which case the following terms and conditions shall apply," be added after "three years," for clarity (MCI WorldCom Comments at 2).

Bell Atlantic argues that MCI WorldCom's changes are unnecessary. Bell Atlantic states MCI WorldCom's proposal applies only to MCI WorldCom's agreement, and that Bell Atlantic intended Appendix A to contain terms that would be identical in the interconnection agreements of all parties to this proceeding, which would be filed as amendments to each agreement (Bell Atlantic Comments at 2).

We agree with MCI WorldCom that its proposed organization and wording more clearly reflect the context and intent of this appendix. Items 2 through 7 in this appendix are descriptive of the terms and conditions that would apply when a CLEC chose to pay by installment, and, therefore, are properly subparts that should follow the introductory sentence. We do not understand Bell Atlantic's objections, in that MCI WorldCom's changes keep the appendix the same for each CLEC, and could be inserted as amendments to each interconnection agreement. Accordingly, we adopt MCI WorldCom's proposed format and language changes.

B. Appendix A, Paragraph 3

MCI WorldCom proposes that the introductory clause "[i]f the [CLEC] elects the option to Amortize the nonrecurring charges for physical collocation over three years" be deleted as redundant, in light of its recommendation concerning Paragraph 1 (MCI WorldCom Comments at 2). Bell Atlantic states that this change is unnecessary (Bell Atlantic Comments at 2). We agree with MCI WorldCom, in that our adoption of its format and language of Paragraph 1 renders this clause redundant. This clause should be removed.

MCI WorldCom also requests that we add after the clause, "the appropriate annual cost of capital as approved by the Department," a new clause, "which is initially [12.16]%" (MCI WorldCom Comments at 3). Bell Atlantic argues that this additional clause is unnecessary because the cost of capital may change over time based on Department rulings (Bell Atlantic Comments at 2). We agree with Bell Atlantic. The Department-approved cost of capital may change over time. There is no purpose served in including the initial cost of capital in this contractual term.

C. Appendix A, Paragraphs 4 and 5

As proposed by Bell Atlantic, Paragraph 4 would read as follows: "[t]he charges under this installment option are designed to be revenue neutral to [Bell Atlantic] compared to the payment of a one-time charge, and are subject to periodic prospective adjustments as often as quarterly to reflect actual bad debt experience, administrative costs, or changes in the approved cost of money." MCI WorldCom proposes five changes.

Three minor wording changes, proposed by MCI WorldCom, are not opposed by Bell Atlantic, and are adopted here by the Department as useful clarifications. The first is to replace the phrase "as often as" with "no more frequently than" in Paragraph 4. The second is to insert "DTE-" before "approved" in Paragraph 4. The third is to replace "shall be" with "shall become" in Paragraph 5.

MCI WorldCom proposes to insert "of [name of collocator]" after "bad debt experience" in Paragraph 4. In MCI WorldCom's view, this reflects the intent to use the actual bad debt experience of the individual collocator, as opposed to a more general statement of bad debt. In addition, MCI WorldCom wants language to clarify that the bad debt experience should mean an actual write-off by Bell Atlantic on account of the CLEC's non-payment (MCI WorldCom Comments at 3). Bell Atlantic is concerned that MCI WorldCom's language would limit it to amounts actually written off by Bell Atlantic. Bell Atlantic wants to have the ability to commence a regulatory or legal proceeding before it has written off the bad debt amount due from a given collocator (Bell Atlantic Comments at 4).

Our intent in the Phase 4-G Order was to permit Bell Atlantic to recover the costs of nonpayment from a collocator which had exercised the installment option. Thus, the intent of MCI WorldCom's language is consistent with that intent, in that it is the individual collocator's failure to pay, rather than some generalized bad debt rate, that should be reflected in Bell Atlantic's charges. However, we also agree with Bell Atlantic that it should not be precluded from attempting to recover these payments from the individual CLEC before actually writing off the bad debt on its books of accounts. Accordingly, we accept MCI WorldCom's clarifying language: "bad debt experience of [name of collocator]," but do not accept MCI WorldCom's proposal to limit the applicability of that term to bad debts that have been written off.⁽¹⁾

Finally, MCI WorldCom argues that Bell Atlantic should not be permitted to collect administrative costs from collocators who choose the installment option, as these costs have already been captured in the collocation cost study (MCI WorldCom Comments at 3). Bell Atlantic argues that the installment option should be revenue-neutral for Bell Atlantic and that it must be able to recover administrative costs associated with the installment option for that goal to be accomplished. Bell Atlantic points to a comparable plan approved by the Federal Communications Commission, in which that agency recognized that recovery of administrative costs was proper (Bell Atlantic Reply Comments at 3-4, citing In the Applications of NYNEX Corporation and Bell Atlantic Corporation, Memorandum Opinion and Order, FCC 97-286 (rel. August 14, 1997)). Bell Atlantic also states that the approved collocation cost study did not include any costs associated with administering the payment option (id. at 3-4).

We find Bell Atlantic's argument more persuasive. Our purpose in ordering an installment option in the Phase 4-G Order was to make it easier for CLECs to enter the Massachusetts market by permitting CLECs to stagger NRC payments. We did not intend Bell Atlantic's finances to be affected negatively when CLECs opt for this plan. In addition, the costs for administration of the installment option were not captured elsewhere. Accordingly, we find that it is appropriate to permit Bell Atlantic to recover the administrative costs associated with the installment plan from the CLECs who choose this plan, and, therefore, Bell Atlantic's proposed language should remain unchanged.

D. Appendix A, Paragraph 6

Paragraph 6 states that Bell Atlantic is authorized to use customary administrative and legal proceedings to collect bad debts associated with either the authorized recurring charges or the unamortized nonrecurring charges. MCI WorldCom states that this paragraph should be deleted because it does not apply to the installment plan, and because the general subject is already covered by the remedy provisions of the existing interconnection agreement between MCI WorldCom and Bell Atlantic (MCI WorldCom Comments at 4). Bell Atlantic asserts that it took this language verbatim from the Department's Phase 4-G Order, and that MCI WorldCom's contention appears to be an effort to modify the terms of that Order (Bell Atlantic Comments at 5).

On this issue, the Department finds that Bell Atlantic is correct. Bell Atlantic's proposed language is directed by our Phase 4-G Order. See Phase 4-G Order at 27. The language does, however, refer to matters beyond the subject of Appendix A, which is the installment plan, in that recurring charges are also included, and recurring charges are addressed elsewhere. Therefore, in light of the editorial changes made above (see, Section III.A.), the Department finds that Paragraph 6 should not be included under the introductory paragraph of Appendix A concerning the installment plan. Instead, it should be listed as a separate term and condition of service, i.e., as Appendix C.

E. Appendix A, Paragraph 7

In Paragraph 7, Bell Atlantic provides for a security interest in the collocater's property as security for amounts due under the installment plan.⁽²⁾ MCI WorldCom asserts that this proposed paragraph should be removed, as it is an example of overreaching, and that Bell Atlantic's recourse for nonpayment, as provided by the Department, is fully described in Paragraph 6. MCI WorldCom argues that Bell Atlantic's proposed language would apply to its corporate facilities and other collateral in every state in which MCI WorldCom has property of any sort. The proposed security interest would also, notes MCI WorldCom, apply to after-acquired property. Further, argues MCI WorldCom, Paragraph 7 contains no provision for the extinguishment of this security interest once the nonrecurring charge is paid in full, and no provision for prepayment is provided. MCI WorldCom notes that its interconnection agreement with Bell Atlantic already has several provisions relating to deposits, billing, form of payment, late payment charges, dispute resolution, and billing disputes. MCI WorldCom asserts that Bell Atlantic has provided no rationale why the

additional security interest proposed here is necessary (MCI WorldCom Comments at 4-5).

Bell Atlantic argues that it is a reasonable and normal business practice for a creditor to expect security to ensure future payments and protection in the event of default; that the proposed security interest does not affect any carrier that pays the Department-approved charges; and that it is designed only as a protection for Bell Atlantic in those cases in which a carriers fails to make payment. Bell Atlantic states that where, as here, Bell Atlantic is being required by the Department to extend significant credit to collocating parties, it should be protected in such a case through a security interest (Bell Atlantic Comments at 5-6).

The Department agrees that Bell Atlantic should have security in some form to provide protection from nonpayment of any unpaid portion of collocation nonrecurring charges. We have ordered that the installment plan be offered in order to assist CLECs that wish to enter the Massachusetts market, but we do not intend Bell Atlantic to be a guarantor for those companies or their expansion into that market. However, we agree with MCI WorldCom that Bell Atlantic's proposal is incommensurate to the risks to which Bell Atlantic is exposed, and we therefore seek a more targeted security provision, one that is better related to the nature of this potential debt.⁽³⁾ We permit Bell Atlantic to include language that offers it a security interest only in the collocation equipment installed in Bell Atlantic central offices in Massachusetts in collocation spaces subject to the terms of the installment payment plan for which balances of nonrecurring⁽⁴⁾ charges remain undischarged beyond the due date. Paragraph 7 should also reflect the fact that this security interest remains in force only so long as there remain unpaid balances related to the collocation installment plan and is not applicable to other unpaid nonrecurring charges and debts of the CLECs. As provided in the last sentence of Bell Atlantic's current proposal, Bell Atlantic shall also be permitted to have all rights and remedies available to it under the Uniform Commercial Code in addition to any rights and remedies available under law or equity.

F. Appendix B

Appendix B is designed to implement the Department's ruling requiring that a carrier receive a credit for nonrecurring charges paid if that carrier vacates collocation space and the space is subsequently reused. Phase 4-G Order at 27. MCI WorldCom has made a number of wording changes, with which Bell Atlantic agrees, and which we adopt (see MCI WorldCom Comments at 6-7; Bell Atlantic Comments at 6). Beyond these, though, MCI WorldCom states that Appendix B should be revised to take into account situations in which the collocator surrenders a portion of its collocation space and continues to use the rest of it (MCI WorldCom Comments at 7). Bell Atlantic explains that it has agreed to permit such sharing of space, but that the CLEC that first rented the space would be required to maintain financial responsibility for the site. In the instance where a collocator surrenders a portion of its collocation space, the initial collocator would be able to recover a portion of the charges it has paid to Bell Atlantic from the carrier with which it is sharing the space. Thus, in this situation, Bell Atlantic states, no credit would

be due from Bell Atlantic to a carrier that is sharing its collocation space (Bell Atlantic Comments at 7).

Bell Atlantic also states that if a carrier reduces the size of its collocation space, there should be no credit unless the vacated space is reused. Bell Atlantic notes that it may be required to incur additional costs to make the space available for collocation by another carrier and that it should be permitted to offset the credit with such additional costs (Bell Atlantic Comments at 7). Finally, Bell Atlantic agrees, though, with MCI WorldCom that a carrier would not be rebilled for the nonrecurring charge if it chooses to renew its collocation license for the same space (id. at 7-8).

The Department finds that Bell Atlantic has properly characterized the intent of the reuse credit and, in particular, has presented a reasonable framework for the case in which a collocator chooses to share previously rented space with another carrier. In that instance, the initial collocator must negotiate the appropriate nonrecurring charge credit payment from the new tenant. Accordingly, beyond the wording changes that have been agreed to by the two parties, no further changes are necessary to Appendix B.

IV. ORDER

After due consideration, it is

ORDERED: That the issues under consideration above be determined as set forth above; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts shall file with the Department within 14 days of the date of this Order a final compliance filing incorporating the modifications the Department made above; and it is

FURTHER ORDERED: That the parties comply with all other directives contained herein.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

1. The Department expects that this method will not result in double recovery of any bad debt amounts.
2. The security interest in Paragraph 7 grants Bell Atlantic a "continuing security interest in and to all of [CLEC]'s personal property including [CLEC]'s now-owned and hereafter acquired accounts, goods, general intangibles, equipment, inventory, and contract rights and in the proceeds and products thereof."
3. Bell Atlantic may choose standard commercial methods to ensure payment of installment plan charges, as long as those methods are reasonably related to the installment payment option. For example, Bell Atlantic might require a bond from collocators in the event that a collocator defaults on installment payments.
4. This security interest would also apply to unpaid balances of recurring charges for customers who have taken the installment option.